SUPREME COURT, U. S.

Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1970

No. 493

WALTER JOSEPH COLLINS,
Petitioner,

—against—

UNITED STATES

On Petition for a Writ of Certiorari to
the United States Court of Appeals for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

Questions Presented 1
Argument 2
Conclusion 13

CITATIONS

Cases: Pages

Calhoon v. Harvey, 379 U.S. 134 (1964) 4
Chaudron v. United States, 425 F.2d 605 (8th Cir., 1970), cert. denied, October 12, 1970 (No. 5426, this Term) 6
Szepil v. Hershey, 425 F.2d 251 (7th Cir., 1970), cert. denied, October 12, 1970 No. 244, this Term) . . 6
DuVernay v. United States, 394 F.2d 979 (5th Cir., 1968), *aff'd.* by an equally divided Court, 394 U.S. 309 (1969) 1,2,8
McKart v. United States, 395 U.S. 185 (1969) 11
Oestereich v. Selective Service System Local Board, 393 U.S. 236 (1968) 7
Powers v. Powers 400 F.2d 438 (5th Cir., 1968) . . 11
Strauder v. West Virginia, 100 U.S. 303 (1880) 8
United States v. Cabbage, F.2d–, No. 19,775, 6th Cir., July 31, 1970, 3Sel.Serv.L. Rep. 3179 4,5
United States v. Clinton--F.Supp.--,Crim. No. 31, 857-C, E.D. La., April 24,1970 5
United States v. Machado, 306 F.Supp. 995 (N.D. Cal 1969) 4
United States v. Stafford, 389 F.2d 215 (2d Cir., 1968). .3
United States v. Williams, 420 F.2d 288 (10th Cir., 1970) 10
United States *ex rel.* Brown v. Resor, 429 F.2d 1340 (10th Cir., 1970) 3,10
United States *ex rel.* Robinson v. Johnson, 316 U.S. 649 (1942) 12
Western Pacific Railroad Case, 345 U.S. 247 (1953) . . . 12
Whitus v. Georgia, 385 U.S. 545 (1967) 9

Regulations:

32 C.F.R.:

1604.52(c) 4
1625.2 3

Other Authorities:

Brief for the Petitioner in DuVernay v. United States 8

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QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to consider the effect of the non-residency of the members of a local board upon the board's power to classify and induct registrants, a question on which the lower courts are seriously divided.

2. Whether this Court should grant certiorari to resolve the question left unanswered by its affirmance of *DuVernay v. United States* by an equally divided Court, of whether the systematic exclusion of Negroes from membership on local boards violates the rights of Negro registrants?

3. Whether certiorari should be granted and the case remanded to the Court of Appeals for further proceedings on the issue of whether petitioner's rights were violated by his having been given misleading information by employees of his local board, as a result of which he failed to file a claim for classification as a conscientious objector?

ARGUMENT

1. The government rejects the contention of the petitioner that the Court below refused to entertain his challenge to the composition of the local board because he had failed to exhaust his administrative remedies by appealing from his I-A classification. While this was the primary ground on which the trial court rejected the challenge (Pet 24a, 31a), and while the Court of Appeals relied on *DuVernay v. United States*, 394 F.2d 979 (5th Cir., 1968), *aff'd* by an equally divided Court, 394 U.S. 309 (1969), which *was* decided on exhaustion-waiver grounds, if the government is willing to concede that the exhaustion-waiver doctrine does not bar the challenge to the composition of the board, as apparently it is, that issue admittedly is no longer before the Court. The question then becomes whether this Court should grant certiorari to resolve the substantive issues, namely whether it is a defense to a prosecution for refusing to submit to induction that the local board which classified the registrant and which issued the order to report for induction was improperly constituted with respect to the residency of its members and/or because Negroes have been systematically excluded from membership.

The government argues that non-compliance with the provisions of the statute and regulations governing the

composition of local boards does not "deprive the orders of the board of legal effect, because like the acts of a legislature, they are acts of a de facto political authority." (Brief of the United States, p. 6). It further contends that the petitioner cannot challenge the composition of the board in any event because his acceptability for military service was "not dependent upon an act of judgement by the Board." (Brief of the United States, pp. 7-8). It is the contention of the petitioner that the composition of the board goes to the matter of its *jurisdiction,* and that a board improperly constituted with respect to the residence of its members lacks jurisdiction to issue *any* induction order and to classify the registrant at all. (Pet. 22). The analogy to "de facto political authority" misses the point, because an improperly constituted board, unlike a malapportioned legislature, for example, cannot perform the acts for which it was created because it lacks the *competency* to do so. It cannot classify registrants based on the personal knowledge of its members *that is deemed to follow from their residing in the county and in the area served by the local board.* It is not de facto, but totally illegal in its composition, and the analogy to a court lacking subject matter jurisdiction is much more in point. Because it was not constituted in accordance with the applicable statute and regulations, it had no power to classify the petitioner at all or to order him to report for induction. Certiorari should be granted to determine this question on which the government and the petitioner are fundamentally at odds--whether an improperly constituted board can exercise de facto authority, or whether its actions are absolutely void.

The petitioner would also dispute the position of the government that his acceptability for military service was not dependent upon an act of judgement on the part of the

board, as the uncontradicted testimony of the petitioner (Pet. 42a, 44a-45a) indicates, namely that no registrant would be permitted to file an application for conscientious objector status after he had received an order to report for induction. The fact that the judgement was made with respect to a class of registrants rather than with respect to the petitioner individually is immaterial, since the petitioner falls within the class. A differently-constituted board might have realized that it had the responsibility to consider post-induction claims for conscientious objector classification, and if so, it would have instructed the clerk to accept such claims rather than to tell registrants, as the petitioner was told, that it would do no good to file one. The classification process is a continuing one, and a registrant may be reclassified even after an order to report for induction has been issued. See 32 C.F.R. Section 1625.2; *United States v. Stafford* 389 F.2d 215 (2d Cir., 1968); *United States ex rel. Brown v. Resor,* 429 F.2d 1340 (10th Cir., 1970). The composition of the board could indeed have had an impact on the petitioner's classification.

Moreover, the difference between the petitioner's basic argument--that an improperly constituted board lacks jurisdiction to classify or induct at all--and that of the government--that there is no standing to attack improper composition unless it can be shown that a requested classification was denied by the board--furnishes all the more justification for granting certiorari so that the question of the power of an improperly-constituted board can be resolved by this Court once and for all.

And this points up the most significant omission in the government's brief in opposition. It does not deny the validity of the important certiorari consideration advanced

by the petitioner to the effect that, "The decisions of the federal courts passing on the question have gone off in many directions, making it all the more important that this Court definitively resolve it." *Calhoon v. Harvey,* 379 U.S. 134, 137 (1964). (Pet 20). Moreover, since the time of the filing of the petition the United States Court of Appeals for the Sixth Circuit has held that the provisions of 32 C.F.R. Section 1604.52(c) are mandatory. *United States v. Cabbage,* –F.2d–, No. 19,775, 6th Cir., July 31, 1970, 3 *Sel. Serv L. Rep.* 3179. In that case the conviction was reversed on other grounds, so it was not necessary for the Court to decide precisely whether improper composition constituted a defense to a criminal prosecution, as was held, for example, in *United States v. Machado,* 306 F.Supp. 995 (N.D.Cal. 1969). But the Court, after resolving the question of whether the requirement of area residence was mandatory, stated:

> "We find it intolerable, however, to send appellant back for reclassification by a board which the United States government has stipulated to be improperly constituted under the Selective Service regulation without any practical remedy for such violation. The principle of administration of the Selective Service system by potential draftees' 'friends and neighbors' is deeply buried in the history of the Selective Service Act. Allegations of violation of the regulation in the constitution of Selective Service Boards are frequent and usually tied to suggestions that such violations are racially motivated. . .
>
> "In view of its stipulation and the adjudication of the issues herein before set

> forth in this case, the government should (and we will assume will) move promptly to reconstitute the Selective Board concerned in accordance with the applicable regulation. In no event will applicant be subject to reclassification until this is done."3 *Sel.Serv.L.Rep.*

The need for definitive resolution of the question by this Court is heightened by the fact that another judge of the United States District Court for the Eastern District of Louisiana, the same Court in which the present petitioner was tried, has held that the requirement of area residency was mandatory and, therefore, invalidated an order to report for induction that had been issued by an improperly constituted board. *United States v. Clinton,* –F.Supp.–Crim. No. 31,857-C, E.D.La., April 24, 1970.

As the Sixth Circuit pointed out in *United States v. Cabbage,* supra, it is frequently contended that violations of the residency requirements are racially motivated. It is significant in the case at bar that the area served by the petitioner's local board is at least two-thirds Negro in population. At present there is one Negro on the board––prior to May, 1967, there were none. The failure to comply with the statute and regulation has meant in practical effect that whites who do not reside in the area classify Negroes who do. It is ironic that Clinton––a white classified and inducted by non-resident whites––is acquitted because of the improper composition of the board, while the present petitioner––a Negro classified and inducted by non-resident whites––faces a sentence of five years' imprisonment.

The present case is a particularly appropriate one for review on certiorari, because it involves both non-residency within the county, a statutory violation, and non-residency within the area, a violation of the Selective Service Regulations. Even the government is troubled by the non-residency of the chairman within the county, and is forced to back on the inapposite argument of de facto authority to sustain a violation of the *statute*. This important factor distinguishes the present case from *Chaudron v. United States* 425 F.2d 605 (8th Cir., 1970), cert. denied, October 12, 1970 (No. 5426, this Term), and *Czepil v. Hershey et al.* 425 F.2d 251 (7th Cir., 1970), cert. denied, October 12, 1970 (No. 244, this Term), both of which involved only area residency. Since the government concedes that the petitioner is not barred by the exhaustion-waiver doctrine from asserting improper composition, there are no collateral issues remaining, and the question is squarely presented.

It is important that this Court resolve the question once and for all. The government demands that young men comply with the Selective Service law and threatens them with imprisonment if they fail to do so. It is not "prejudiced" if a relatively few young men refuse to submit to induction, but it insists that all young men comply with the law and prosecutes the few who do not. But when the government itself is shown to be in violation of the law, it invokes concepts such as "de facto political authority" to excuse its violation. It demands that registrants specifically show that they were prejudiced by the government's failure to follow the law, arrogating to itself the right to violate the law if specific prejudice cannot be shown. There should be one law for the governors and the governed, binding both alike. A draft board not constituted in accordance with the

statute and regulations is a "lawless board" without the power to classify at all or to issue valid orders to report for induction. *C.F. Oestereich v. Selective Service System Local Board*, 393 U.S. 236, 237 (1968).

Certiorari should be granted to determine whether the government itself must comply with the law under which it has initiated criminal prosecutions, and to resolve this important question of federal law, on which the lower courts are divided.

2. The government argues that even assuming that Negroes have been systematically excluded from membership on local boards, this fact does not make the induction order invalid or give rise to a valid defense absent any showing that this resulted in any discrimination practiced by the board on petitioner. (Brief of the United States, p. 6). *It may be asked, "Why not?"* Why should Negroes be expected to serve in the Armed Forces when Negroes are not considered "worthy enough" to serve on local boards? Why is it that Negroes are expected to accept decisions concerning their very life that are made by whites, but whites are not expected to accept decisions concerning their lives that are made by Negroes—which presumably is the reason why Negroes are not allowed to serve on local boards, even in an area that is two-thirds Negro in population? May there perhaps not be some correlation between the absence of Negroes on local boards and the fact that Negro combat deaths in Vietnam are proportionately double those of whites?

These questions cannot be answered by the invocation of the "de facto political authority" doctrine or the demand, "Prove the board discriminated against you because you are a Negro." They relate to the very legitimacy of a system by which young Negro men are asked to give up their lives for

their country while members of their race are not considered "worthy enough" to participate in the selection process of men for the Armed Services. They call into issue the prejudice and racism that are a part of American society today. They demand resolution by this Court.

This matter was before the Court in *DuVernay v. United States,* 394 U.S. 309 (1969), and the Court was unable to resolve it at that time. That case, it is submitted, showed the fundamental unfairness of a system by which a board, whose chairman was a member of the Ku Klux Klan, had the power to classify and induct a young "black militant." (Brief for the Petitioner in *DuVernay v. United States,* pp. 42-43). The question will remain. It should be significant that since the time of *DuVernay, the situation has not basically changed and Negroes are still excluded (or only tokenly included), even on boards that serve areas predominantly Negro in population.* Petitioner's local board still does not have more than the "token Negro." Rather than argue that such exclusion is irrelevant, the government's position would have been better served if it had showed that Negroes now *do* serve on local boards in some proportion to their representation among the general population, particularly in areas that are predominantly Negro. This it cannot do.

The system will not be reformed unless and until this Court holds that when Negroes have been systematically excluded from membership on local boards, a Negro registered with such a board may not be convicted for failure to obey the board's order to report for induction. *C.F. Strauder v. West Virginia,* 100 U.S. 303 (1880). If this Court were to so hold, the system, it is submitted, would be reformed overnight and black faces would mingle with white ones on local boards just as they do in the foxholes, where

now black faces in proportion predominate. If the Court does not face up to the problem and does not take remedial action, the status quo may be expected to continue. This is what has happened so far.

Petitioner is not contending that a Negro must sit on every local board that may have occasion to classify a Negro registrant nor even that every local board must be racially proportioned. What he is contending is that before a Negro registrant is convicted and sentenced to five years' inprisonment, he should have the opportunity to show that Negroes have been systematically excluded from membership on his board where, in view of the racial composition of the area served by that board, it would be expected that in the absence of systematic exclusion, Negroes would have been appointed. Where the area served by the board is two-thirds Negro in population, as is the case with petitioner's board, and there is only a "token Negro" out of six members--and that not until May, 1967--systematic exclusion has been established. *C.f. Whitus v. Georgia*, 385 U.S 545 (1967).

The court should grant certiorari to resolve this fundamental question.

3. The government apparently does not dispute the proposition that if the petitioner were dissuaded from filing a conscientious objector claim by misleading statements of board officials, this would render the order to report for induction invalid. It also apparently agrees with the contention of the petitioner that failure to appeal from a prior I-A classification does not bar assertion of this defense. Its position is that "he made no such claim and he did not establish that he was in fact misled." (Brief for the United States, p. 9).

However, the uncontradicted testimony of the petitioner showed that he was advised by the clerk of the local board and by another official that it would do him no good to file an application for conscientious objector status after he had received an order to report for induction, because the board would not consider it. (Pet 42a, 44a-45a). He then testified that he did not file the Form 150, because he believed that it would be futile to do so. (Pet 48a). These facts, if true, constitute erroneous advice in violation of a registrant's right to fair treatment from his board. See *e.g., United States v. Williams,* 429 F.2d 1340 (10th Cir., 1970).

The government made no attempt to contradict this testimony, and for this reason the petitioner's failure to question the clerk on this point is fully explicable. If the government had intended to challenge the petitioner's version of what happened, it might be expected that it would have done so in the trial court. This it did not do. There is nothing to indicate that the trial judge, who resolved the question against the petitioner in ruling on the motion to dismiss, disbelieved the petitioner, since he held that the issue could not be raised on grounds of exhaustion-waiver. (Pet. 31a-33a). The trial judge also emphasized that the petitioner did not appear before the *board* and, in light of his ruling on exhaustion-waiver, made no finding as to the actions of the clerk or other employees. Although he petitioner testified to these matters at trial, the question was *not* before the jury. The jury was not instructed that it could acquit the petitioner if it found that misleading advice had been given, which is understandable, since the Court had previously ruled that the petitioner was foreclosed by principles of exhaustion-waiver from raising the issue.

The cryptic opinion of the Court of Appeals, which in

view of the reliance on *DuVernay* and the distinguishing of *McKart v. United States*, 395 U.S. 185 (1969), could be explained on exhaustion-waiver grounds, did not deal with this issue specifically. Petitioner has contended that it implicitly affirmed the action of the District Judge in rejecting the claim on exhaustion-waiver grounds. But if it did so, its decision in that regard would be inconsistent with its own decision in *Powers v. Powers*, 400 F.2d 438 (5th Cir., 1968), and the decisions of other Courts of Appeal which have passed on the question. On the other hand, if petitioner were not barred from asserting the defense on exhaustion-waiver grounds, and since the matter had been determined below by the Court rather than the jury, it is inexplicable why the Court of Appeals did not reach the merits of the contention, which had been briefed and argued before it.

In other words, the Court of Appeals either rejected the contention on exhaustion-waiver grounds——which the government would concede to have been improper——or it did not pass on it at all. The uncontradicted evidence of the petitioner did establish that he was misled by the employees of the board, and he was entitled to have the validity of that contention judicially determined. The refusal of the Court of Appeals to deal properly with this crucial defense represents a departure so far from the accepted course of judicial prodeedings as to call for an exercise of this Court's power of supervision.

On this issue the judgement of the Court of Appeals affirming the petitioner's conviction should be vacated and the case remanded to that Court with directions to rule on the contention of the petitioner that his rights were violated when he was dissuaded from filing a claim for conscientious objection because of misleading advice given to him by

employees of the board *C.f. United States ex rel. Robinson v. Johnson*, 316 U.S. 649 (1942); *Western Pacific Railroad Case*, 345 U.S: 247 (1953).

CONCLUSION

For the reasons aforesaid, and for the reasons set forth in the Petition for Certiorari, it is respectfully prayed that the writ be granted.

Respectively Submitted

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